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The United States and the WTO Dispute Settlement System

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THE DISPUTE SETTLEMENT SYSTEM

According to the Dispute Settlement Understanding (DSU), the agreement establishing the dispute settlement system that was negotiated as part of the Uruguay Round of 1995, WTO members may seek to resolve conflicts through the good offices of the organization's director-general or by agreeing to arbitration; they may also invoke the formal dispute settlement mechanism. To pursue this last option, the parties in the dispute are first required to engage in consultation. If these consultations are unsatisfactory, a complainant can, within sixty days, request the establishment of a panel of three members to hear the case. The panel issues an interim report and then a final one. If it finds that a member has failed to comply, and that member does not appeal, the body can make a recommendation as to how the member could come into compliance. If it is impractical to comply immediately, the member is given "a reasonable period of time in which to do so."[6] The finding can also be appealed to a second panel of three members of a permanent seven-person Appellate Body (AB), which operates like the supreme court of the organization.

If the member loses the appeal and fails to act within a reasonable period of time, the rules call for the parties to negotiate compensation, "pending full implementation." [7] "Compensation" is generally understood to require the defendant to provide additional concessions, typically in the form of reducing other trade barriers of interest to the plaintiff. Compensation is, however, "voluntary"—and rare.[8] If after twenty days, compensation cannot be agreed upon, the complainant may request authorization to suspend equivalent concessions. In particular, "the level of the suspension of concession ... shall be equivalent to the level of nullification and impairment." [9] When, for example, the WTO found that the EU had cost the United States $116.8 million worth of exports by illegally banning hormone-fed beef, the United States was authorized to impose

[6] World Trade Organization, "Understanding on Rules and Procedures Governing the Settlement of Disputes," Annex 2 to the *Agreement Establishing the World Trade Organization*, Art. 21.3.
[7] Ibid., Art. 22.2.
[8] Ibid., Art. 22.1, which states, "compensation is voluntary and, if granted, shall be consistent with the covered agreements." This is generally understood to require that it be based on most-favored-nation (MFN) principles.
[9] Ibid., Art. 22.4.

punitive tariffs on $116.8 million worth of EU exports.[10] Arbitration, to be completed within sixty days, may be sought on the level of suspension, the procedures, and the principles of retaliation. [11]

The dispute settlement system has generally been successful in helping members resolve disputes and in obtaining compliance where violations have been found. Many cases have been settled in the consultation stage.[12] While there are delays, particularly when legislative action is required, and a few cases in which compliance has been lacking, the evidence suggests that by and large the United States and other countries eventually come into compliance. [13] Nations appear to comply less because of retaliation, which has rarely been used, but rather because they believe it is in their interest to do so.[14] This is because on balance they benefit from the rules and care about their reputations in a system in which there are ongoing negotiations. They also care about their relationships with significant trading partners.[15]

The system has been used extensively by the United States, but the United States has not dominated it. Table 1 (see Appendixes) provides a listing of several cases the United States has launched successfully. It illustrates how the United States has been able to challenge foreign measures that have inhibited U.S. exports through discriminatory

[10] See Charan Devereaux, Robert Z. Lawrence, and Michael D. Watkins, *Case Studies in US Trade Negotiation, Volume 2: Resolving Disputes* (Washington, DC: Institute for International Economics, 2006), p. 72.

[11] "Dispute Settlement Understanding," Art. 22.6.

[12] For an analysis see Marc L. Busch and Eric Reinhardt, "Developing Countries and General Agreement on Tariffs and Trade/World Trade Organization Dispute Settlement," *Journal of World Trade*, Vol. 37, No. 4 (2003), pp. 719–35.

[13] The case between the United States and the EU regarding hormone-fed beef is one example. For a detailed discussion see Devereaux, *Case Studies in US Trade Negotiation*, Chapter 1; and Benjamin L. Brimeyer, "Bananas, Beef and Compliance in the World Trade Organization: The Inability of the WTO Dispute Settlement Process to Achieve Compliance from Superpower Nations," *Minnesota Journal of Global Trade*, Vol. 10, No. 1 (2001), p. 133. William F. Davey, in "The WTO Dispute Settlement System: The First Ten Years," *Journal of International Economic Law*, Vol. 8, No. 1 (2005), pp. 17–50, found there was compliance in 83 percent of the 181 WTO cases prior to June 2002. Similarly high rates were found under GATT by Robert Hudec in *Enforcing International Trade Law*.

[14] Fabien Besson and Racem Mehdi do not find support for the hypothesis that retaliation significantly hampers developing countries' effectiveness in DSU. See Fabien Besson and Racem Mehdi, "Is the WTO Dispute Settlement System Biased Against Developing Countries? An Empirical Analysis," paper presented at the Second International Conference on "European and International Political & Economic Affairs," Athens, Greece, May 27–29, 2004.

[15] Chad Bown finds that, the more trade between disputants, the greater the compliance. He interprets this as evidence that retaliation is important in inducing compliance, but since retaliation is rare, it indicates only that compliance is enhanced by extensive trade relations. See Chad P. Bown, "On the Economic Success of GATT/WTO Dispute Settlement," *The Review of Economics and Statistics*, Vol. 86, No. 3 (2004), pp. 811–23.

taxes (e.g., Chinese value-added tax [VAT] rebates on domestic semiconductors), nontariff barriers (e.g., Indian quotas), inappropriate regulations (e.g., Japanese apples), unfair applications of the trade laws (e.g., Mexican antidumping and countervailing duties), and failure to protect intellectual property (e.g., the Pakistani patent regime and Japanese copyright rules). Table 2, by contrast, reports cases filed against the United States. These losses assist the U.S. government in avoiding protectionist and discriminatory measures and regulations. These include U.S. steel safeguards, U.S. antidumping practices (Byrd Amendment), export subsidies (Foreign Sales Corporation), regulatory practices that discriminated against foreigners (Venezuela and Brazilian petroleum refiners), and cotton subsidies (Brazil).

Although the very least developed countries do experience difficulties in using the system, there is evidence that it is being widely used by both developed and developing countries in rough proportion to their shares in world trade.[16] Between 1995 and 2000, for example, high-income countries filed 70.2 percent of disputes, while developing countries represented 29.8 percent of submitted cases. In the next five years (2001–2006), by contrast, developing countries filed a majority of the cases brought (52.1 percent).[17] While these numbers reflect mainly developing countries with large export shares, such as India and Brazil, there are also cases of small developing countries that have leveraged

[16] On the difficulties experienced by least developed countries, see Andrew T. Guzman and Beth Simmons, "Power Plays and Capacity Constraints: The Selection of Defendants in WTO Disputes," paper presented at the University of Wisconsin, 2005. There is, however, also evidence that the very least developed countries have trouble participating because of a lack of resources and expertise. See Chad P. Bown and Bernard Hoekman, "WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector," *Journal of International Economic Law*, Vol. 8, No. 4 (2005), pp. 861–90; Chad P. Bown, "Developing Countries as Plaintiffs and Defendants in GATT/WTO Trade Disputes," *The World Economy*, Vol. 27, No. 1 (2004), pp. 59–80; Besson and Mehdi, "Is the WTO Dispute Settlement System Biased Against Developing Countries?"; Busch and Reinhardt, "Developing Countries and General Agreement on Tariffs and Trade/World Trade Organization Dispute Settlement"; Gregory Schaffer, "Weaknesses and Proposed Improvements to the WTO Dispute Settlement System: An Economic and Market Oriented View," paper prepared for "WTO at 10: A Look at the Appellate Body," Sao Paulo, May 16–17, 2005; and Victor Mosoti, "Africa in the First Decade of WTO Dispute Settlement," *Journal of International Economic Law*, Vol. 9, No. 2 (2006), pp. 427–53. Political considerations, e.g., aid withdrawal and concern for revocation of the Generalized System of Preferences, are said to inhibit developing countries' effective use of the DSU, according to Chad P. Bown in "Participation in WTO Dispute Settlement: Complainants, Interested Parties and Free Riders," *World Bank Economic Review*, Vol. 19, No. 2 (2005), pp. 287–310; and William J. Davey "The WTO Dispute Settlement System: How Have Developing Countries Fared?" *Illinois Public Law and Legal Theory Research Paper*, No. 05-17 (2005).

[17] Figures calculated from http://www.worldtradelaw.net.

the system effectively to challenge large trading partners.[18] Another noticeable development is the increase in South-South disputes.[19] All in all, recent trends attest to developing countries' increased knowledge of and confidence in the WTO dispute resolution process.

Several features of the system merit emphasis. First, the WTO itself does not conduct investigations and instigate proceedings. Although the WTO does review its members' trade policies, there is no central policing mechanism—enforcement is carried out entirely as a result of member initiatives. While the respondents cannot block the case from going forward, the claimant may withdraw the case at any time, even if the defendant has not come into compliance.

Second, the operation of the system reflects the nature of the WTO as an *intergovernmental* organization.[20] Although private counsel can be employed to make arguments, and amicus briefs by nongovernmental entities have been allowed on occasion, only governments have standing to bring cases.[21] There is no private right of action. Violations of the agreements may have damaged private parties, but they have no recourse on their own and must operate through their governments. Similarly, retaliation is undertaken against the defendant country, and it could inflict damage on the incomes of exporting firms that had nothing to do with the infraction and whose only error was being located in the defending country—a reason why some believe that only compensation should be allowed.

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[18] For example, Costa Rica against the United States concerning bans on the imports of cotton and fiber underwear in 1995; Antigua and Barbuda against the United States concerning cross-border supply of Internet gambling and betting in 2003; and Bangladesh, a least developed country (LDC), against India in antidumping measures in 2004.

[19] See OECD, "Analysis of Nontariff Barriers of Concern to Developing Countries," in *OECD Trade Policy Working Papers*, No. 16 (OECD Publishing, 2005). It is also interesting to note that, according to the OECD, South-South cases increasingly resemble what used to be thought of as North-South disputes: for instance, antidumping and sanitary and phytosanitary measures.

[20] With an important recent exception concerning EU compliance in the beef-hormone case, panel proceedings have occurred in closed sessions with only the participants in the dispute in attendance.

[21] *Banana III: European Communities—Regimes for the Importation, Sale and Distribution of Bananas* allowed member states to employ private lawyers in their litigation, and the turtle-shrimp and asbestos cases opened up the process to amici briefs. See World Trade Organization Appellate Body, *European Communities—Regimes for the Importation, Sale and Distribution of Bananas*, AB-1997-3, WT/DS27/AB/R, September 9, 1997.

Third, the DSU does not ordain a common law system with binding precedents. Technically, there is no stare decisis.[22] Each panel ruling is thus in principle unique—only the members themselves can adopt rules that "add to or diminish the rights and obligations" in the agreement.[23] In practice, however, precedents are actually given great weight, and panel and Appellate Body reports refer frequently and deferentially in many footnotes to the reasoning contained in other reports. The Appellate Body plays a particularly important oversight role in disciplining judgments and ensuring their consistency. Thus, de facto, the DSU has established something approaching a common-law system.

Fourth, WTO rulings are not automatically implemented. In practice, even if not technically in law, members have discretion as to whether they will comply; they may refuse even though this may mean breaking the agreement and perhaps facing retaliation against their exports. De jure such retaliation is meant to be temporary and is not a substitute for compliance.[24] But de facto retaliation can become the permanent outcome of a dispute. This means that the retaliation system may operate as a safety valve.

Fifth, there is no attempt to compensate the winner for damages incurred during the period of noncompliance, a practice that stands in contrast to contract cases in common-law legal systems. This has the advantage of not generating further disputes over the size and payment of such damages. But the downside is that parties expecting to lose have an incentive to delay the process as long as possible. Parties also may engage in rule-breaking behavior in the knowledge that the most that they will have to do is come into compliance at a later date.

In sum, the WTO dispute settlement mechanism is a distinctive form of arbitration combined with a variation of judicial review. The parties are required to submit to the process if one party launches a complaint. An arbitration panel investigates

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[22] See Raj Bhala, "The Power of the Past: Towards de Jure Stare Decisis in WTO Adjudication," *George Washington International Review*, Vol. 33, Nos. 3 and 4 (2001), pp. 873–978; "The Myth about Stare Decisis and International Trade Law," *American University International Law Review*, Vol. 12, No. 4 (1999), pp. 845–956; and "The Precedent Setters: De Facto Stare Decisis in WTO Adjudication," *Journal of Transnational Law and Policy*, Vol. 9, No. 1 (1999), pp. 1–151.

[23] "Dispute Settlement Understanding," Art. 3.2.

[24] See John H. Jackson, "The WTO Dispute Settlement Understanding: Misunderstandings on the Nature of Legal Obligations," *American Journal of International Law*, Vol. 91, No. 2 (1997), pp. 60–64; and "The Changing Fundamentals of International Law and Ten Years of the WTO," *Journal of International Economic Law*, Vol. 8, No. 1 (2005), pp. 3–15.

and reaches conclusions based on rules previously negotiated by the members. The resulting rulings are binding on the parties. Failure to comply or provide compensation can result in the suspension of concessions. The rulings are also subject to appeal. However, the WTO system remains weaker than the arbitration processes common in domestic legal systems for four major reasons: Enforcement is not automatic, precedents are not strictly binding, standing of all injured parties is not assured—only governments bring cases—and remedies are limited.